Supreme Court, U.S.
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NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

KAREN R. LUNDE,

PETITIONER

vs.

CHARLES M. HELMS, ET AL.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS, IN REVIEWING THE DECISION OF THE DISTRICT COURT JUDGE WITH RESPECT TO RECUSAL, USE THE WRONG STANDARD?

2. DID THE COURT OF APPEALS ERR IN TOTALLY IGNORING PETITIONER'S SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL IN SUSTAINING THE DISTRICT COURT'S SUMMARY JUDGMENT GROUNDED ON RES JUDICATA?

LIST OF PARTIES TO THE PROCEEDING

Karen R. Lunde, Petitioner.

Respondents:

Charles M. Helms, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa;

John W. Eckstein, Dean of the College of Medicine, University of Iowa;

College of Medicine, University of Iowa;

Hunter R. Rawlings, III, President, University of Iowa;

Jerald W. Dallam, Registrar, University of Iowa;

The University of Iowa, State of Iowa.

TABLE OF CONTENTS

Questions presented for review iii

List of parties to the proceeding . iv

Table of authorities vi

References to reports of opinions delivered in the case by other courts 1

Statement of grounds on which jurisdication of this court is invoked 2

Constitutional provisions involved . 3

Statutory provisions involved 4

Statement of the case 16

Argument 1. 34

Argument 2. 45

Appendix A-1

U. S. Court of Appeals for the Eighth Circuit opinion for which review is sought A-2

U. S. Court of Appeals, denial of petition for rehearing and of suggestion for rehearing en banc A-20

TABLE OF AUTHORITIES

Cases:

Alexander v. Primerica Holdings, Inc., 10 F.3d 155 (3rd Cir. 1993) 36

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) A-17

Aronson v. Brown, 14 F.3d 1578 (Fed. Cir. 1994) 37

Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) 49

Brody v. President of Harvard College, 664 F.2d 10 (1st Cir. 1981), cert. denied, 455 U.S. 1027 (1982) A-14

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) A-17

Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) 49

Dairy Queen, Inc. v. Wood,
369 U.S. 469, 82 S.Ct. 894,
8 L.Ed.2d 44 (1962) 49
Easley v. University of Michigan
Board of Regents, 906 F.2d 1143,
(6th Cir. 1990), cert. denied,
499 U.S. 947 (1991) A-14
England v. Louisiana State Board
of Medical Examiners, 375 U.S.
411, 84 S.Ct. 461, 11 L.Ed.2d
440 (1964) 21, 48
Franklin v. Gwinnett County
Public Schools, ___U.S.____,
112 S.Ct. 1028, 117 L.Ed.2d
208 (1992) 20, 47
Get Away Club, Inc. v. Coleman,
969 F.2d 664 (8th Cir. 1992) ... A-17
Gray v. University of Arkansas,
883 F.2d 1394 (8th Cir. 1989) .. A-13

Hafer v. Melo, 502 U.S.___,
112 S.Ct. 358, 116 L.Ed.2d
301 (1991) 47, 48
Health Services Acquisition
Corp. v. Liljeberg, 796 F.2d
796 (5th Cir. 1986) 42
Israel v. Farmers Mutual Insur-
ance Ass'n., 339 N.W.2d
143 (Iowa 1983) A-18
Lane v. Peterson, 899 F.2d 737,
(8th Cir.), cert. denied,
498 U.S. 823 (1990) A-18, A-19
Lewis v. Tuscan Dairy Farms,
Inc., 25 F.3d 1138 (2nd Cir.
1994) 37
Liljeberg v. Health Services
Acquisition Corp., 486 U.S.
847, 108 S.Ct. 2194, 100
L.Ed.2d 855 (1988) 37, 38, 40

Liteky v. U. S., ___U.S.____,
114 S.Ct. 1147, 127 L.Ed.2d
474 (1994) 37, 38
Lunde v. Helms, 29 F.3d 367
(8th Cir. 1994)
..... 1, 34, 39, 43, 44, A-2, A-3
Lunde v. Helms, 898 F.2d 1343
(8th Cir. 1990), cert. denied,
498 U.S. 897, 111 S.Ct. 249
(1990) 18, A-4, A-7, A-16
Lunde v. Iowa Board of Regents,
487 N.W.2d 357 (Iowa App.
1992, cert. denied, ___U.S.___,
113 S.Ct. 377 (1992) . 26, A-4, A-8
Lytle v. Household Mfg., Inc.,
494 U.S. 545, 110 S.Ct. 1331,
108 L.Ed.2d 504 (1990) 49
Matter of Huntington Commons
Associates, 21 F.3d 157
(7th Cir. 1994) 37

Patsy v. Board of Regents of
State of Fla., 457 U.S. 496,
102 S.Ct. 2557, 73 L.Ed.2d 172
(1982) 24
People Helpers Foundation v.
Richmond, VA, 12 F.3d 1321
(4th Cir. 1993) 34
Price Waterhouse v. Hopkins, 490
U.S. 228, 109 S.Ct. 1775,
104 L.Ed.2d 268 (1989) 20
St. Paul Fire & Marine Insurance
Co. v. FDIC, 968 F.2d 695
(8th Cir. 1992) A-17
U. S. v. Chischilly, 30 F.3d 1144
(9th Cir. 1994) 35
U. S. v. Greenspan, 26 F.3d 1001
(10th Cir. 1994) 35
University of Tennessee v. Elliott,
478 U.S. 788 (1986) A-18

Willner v. University of Kansas,
848 F.2d 1023, (10th Cir. 1988),
cert. denied, 488 U.S. 1031
(1989) A-12, A-15

Other Authorities:

U. S. Constitution, Laws, and Statutes
First Amendment 16, 31, A-19
Seventh Amendment ....
..... iii, 3, 17, 26, 45, 46, 49
Eleventh Amendment 47
Fourteenth Amendment, Sec. 1 16
20 U. S. Code Sec. 1681 et seq
..... 16, 19, 46, 50
28 U. S. Code Sec. 455
..... 4, 27, 29, 36, 41, A-13
28 U. S. Code Sec. 1254(1) 2
42 U. S. Code Sec. 1983 16, 22, 24, 50
42 U. S. Code Sec. 2000d-7 47
Title IX, Education Amendments
of 1972 ..... 16, 31

Civil Rights Act of 1871 16

Civil Rights Remedies Equalization Amendment of 1986 47

Court Rules

Supreme Court Rule 10.1 44

Supreme Court Rule 14.1(i) 16

Rule 38(a), Fed. Rules of Civ. Pro. 46

Rule 56(c), Fed. Rules of Civ. Pro. A-17

Statutes of the State of Iowa

Code of Iowa, Chapter 17A, Administrative Procedure Act 11, 18, 45, 49, 50

Sec. 17A.1, par. 2 11

Sec. 17A.2, par. 2 11

Sec. 17A.10, par. 1 12

Sec. 17A.11, par. 1 13

Sec. 17A.12, par. 4 13

Sec. 17A.19, par. 7 14

Sec. 17A.23 .... 15, 22, 23, 49

Restatement of Judgments 2d, Sec. 24 A-19

REFERENCES TO REPORTS OF THE OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The opinion of the United States Court of Appeals for the Eighth Circuit, of which review is sought here, pages A-2 through A-19 herein, has been published in the Federal Reporter, as Lunde v. Helms, 29 F.3d 367 (8th Cir. 1994).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Date of the entry of the judgment sought to be reviewed: July 6, 1994.

(ii) Date of any order respecting a rehearing: Order denying rehearing, August 15, 1994; see page A-20 herein.

(iii) There has been no cross-petition for a writ of certiorari.

(iv) Statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari: 28 U. S. Code Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS INVOLVED

Title 28, U. S. Code, Sec. 455: Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served

during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform him-

self about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or

equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietory interest of a policyholder in a mutual

insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification

arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected

by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Chapter 17A, Code of Iowa, Administrative Procedure Act.

17A.1 Citation and statement of purpose.

* * * 2. This chapter is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public. . . .

17A.2 Definitions.

* * * 2. "Contested case" means a pro-

ceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

17A.10 Informal settlements -- waiver.

1. Unless precluded by statute, informal settlements of controversies that may culminate in contested case proceedings according to the provisions of this chapter are encouraged. Agencies shall prescribe by rule specific procedures for attempting such informal settlements prior to the commencement of contested case proceedings. This subsection shall not be construed to require either party to such a controversy to utilize the informal procedures or to settle the contro-

versy pursuant to those informal procedures.

17A.11 Presiding officer -- administrative hearing officers.

1. The presiding officer in evidentiary hearings required to be conducted by an agency according to the provisions of this chapter governing contested cases shall be the agency, one or more members of a multimember agency, or an administrative hearing officer appointed according to the terms of this section. . . .

17A.12 Contested cases -- notice --hearing -- records.

* * * 4. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to be represented by counsel . . .

17A.19 Judicial review.

* * * 7. In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court should not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. . . .

17A.23 Construction.

Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now in existence or hereafter enacted. . . .

STATEMENT OF THE CASE

On February 15, 1989, Karen R. Lunde filed her Complaint in the U. S. District Court for the Southern District of Iowa; the case was assigned to the Hon. Charles R. Wolle, District Judge.

Pursuant to Supreme Court Rule 14.1 (i), the basis for Federal jurisdiction set forth in the Complaint was: First Amendment, U. S. Constitution; Fourteenth Amendment, Sec. 1, U. S. Constitution; Title 20, U.S. Code, Secs. 1681 and 1687 (Title IX of the Education Amendments of 1972, as further amended); and Title 42, U. S. Code, Sec. 1983 (Civil Rights Act of 1871, as amended). The Complaint did not include any pendent state claims.

Relief sought in the Complaint was injunctive and declarative; no jury was requested. However, when six months

passed, with no relief granted by Judge Wolle, who was obviously biased in favor of Respondents, and with no Answer filed by Respondents, Petitioner amended her Complaint to request damages relief, and to request a jury trial on damages as to the four individual Respondents, pursuant to the Seventh Amendment, U. S. Constitution. This Complaint (Amended) was filed August 15, 1989.

On August 31, 1989, Judge Wolle entered an Order which, among other things, sua sponte, placed Petitioner's Federal case on a stay, of indefinite duration. Petitioner appealed portions of this Order to the U. S. Court of Appeals for the Eighth Circuit. In a per curiam opinion filed March 23, 1990, the Court of Appeals said it lacked appellate jurisdiction over the stay

order; treating Petitioner's appeal as a request for mandamus, the Court of Appeals held that the district court did not clearly abuse its discretion in staying the federal case pending resolution of the on-going state proceedings. [Emphasis supplied.] Lunde v. Helms, 898 F.2d 1343 (8th Cir., 1990); cert. denied, 498 U.S. 897, 111 S.Ct. 249 (1990).

The on-going state proceedings to which the Court of Appeals made reference were proceedings pursuant to Chapter 17A, Code of Iowa, the Iowa Administrative Procedure Act. These proceedings, which commenced February 16, 1989 immediately following Judge Wolle's denial of Petitioner's request for a temporary restraining order, had as their

purpose the dismissal of Petitioner Karen R. Lunde from the University of Iowa College of Medicine, purportedly for academic reasons, but actually because Petitioner's behavior did not conform to what some faculty members apparently believed to be appropriate for a female medical student and eventually, a female physician. These faculty members expressed their views in written evaluations of Petitioner which were reflected in the grades she received from them, violating Petitioner's Federal statutory rights to be free of sexual discrimination. See, Title 20, U. S. Code, Sec. 1681(a): "No person in the United States shall, on the basis of sex, be excluded from participation in,

be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."

Early on, Petitioner attempted to invoke new U. S. Supreme Court decisions in the developing area of the Civil Rights laws of the United States; these decisions supposedly made it easier for Petitioner to prove her case, as in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268, decided May 1, 1989, and supposedly made it clear that Petitioner could seek a damages remedy, as in Franklin v. Gwinnett County Public Schools, ____U.S.____, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). In fact, however, these decisions were simply ig-

nored or explained away by officials employed by the University of Iowa.

In participating in the State administrative proceedings to the extent she did, Petitioner relied on a U. S. Supreme Court decision, England v. Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed.2d 440 (1964), and, following entry of the District Court's stay order on August 31, 1989, Petitioner repeatedly gave notice to Respondents, and the Courts, of her election to litigate her Federal claims in the Federal forum. In all cases, the text of Petitioner's notice, repeated many times, was substantially as follows:

> Plaintiff has a right to a choice of forum and the fact that Plaintiff is not submitting certain of her claims,

such as her 42 U. S. Code Sec. 1983 claim, to any state forum; she is reserving that claim, and possibly certain others, for litigation in the Federal courts.

Petitioner was also relying on a provision in governing State law, Sec. 17A.23, Iowa Code (ante, page 15):

> Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be **in addition** to those created or imposed by every other statute now in existence or hereafter enacted. . . .[Emphasis supplied.]

Since it appeared that nothing that would take place in the State administrative

proceedings would preclude Petitioner from eventually pursuing her suit in Federal court, because of Sec. 17A.23, Iowa Code, as quoted above, Petitioner felt safe in participating in the State administrative proceedings to the extent necessary. Furthermore, Judge Wolle said, in his order of August 31, 1989, in pertinent part:

> The stay will be in effect until the final disposition of proceedings before the Iowa Board of Regents, and any subsequent proceedings authorized by Iowa statutes, including judicial review proceedings in the Iowa courts. [Citation omitted.]
>
> This court will lift this stay and hold further proceed-

> ings in this action if, on application and notice to defendants, the plaintiff demonstrates that any administrative and judicial proceedings plainly infringe the constitional rights or federal statutory rights of the plaintiff in respects that the State judiciary cannot or will not address and remedy. . . .

This was a far cry from the U. S. Supreme Court's decision in Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), to the effect that exhaustion of State administrative remedies "should not be required as a prerequisite to bringing an action pursuant to [42 U.S. Code] Sec. 1983."

Petitioner moved Judge Wolle to lift the stay, which lasted **three and one-half years**, on at least two separate occasions. The denial of one of these motions was appealed to the U. S. Court of Appeals for the Eighth Circuit; the appeal was accompanied by a motion for recusal. On September 17, 1991, the Court of Appeals ordered the appeal dismissed "for lack of jurisdication" and denied the motion for recusal as "moot." A petition for rehearing was denied Nov. 4, 1991. Thus, it was clear to Petitioner that the Court of Appeals would do nothing about Judge Wolle's stay order, and even denied its jurisdiction to consider it.

Petitioner had no choice, then, but to go forward with the State administrative proceedings. She did so under pro-

test, and when they were completed, she appealed the adverse decision, which was a foregone conclusion considering that these proceedings were conducted entirely by University of Iowa officials and others with University of Iowa loyalties. Petitioner totally exhausted her state remedies. See, Lunde v. Iowa Board of Regents, 487 N.W.2d 357 (Iowa App. 1992), cert. denied, ____U.S.____, 113 S. Ct. 377 (1992).

With the conclusion of the State administrative proceedings, Petitioner then sought to return, at last, to Federal Court, where she reasonably expected to try her damages claim before a jury, pursuant to her 1989 request for a jury, and pursuant to the Seventh Amendment, U. S. Constitution, (ante, page 3) which guaranteed

her a jury trial where "the value in controversy" exceeds twenty dollars; Petitioner had alleged damages of twenty **million** dollars (five million dollars actual damages, fifteen million dollars punitive damages). See, Complaint (Amended), Div. II, filed August 15, 1989.

On December 18, 1992, Petitioner filed a Motion to dissolve the stay, informing the District Court that the State administrative and judicial proceedings "have now been concluded." On that same date, Petitioner filed a Motion pursuant to 28 U. S. Code Sections 455(a) and 455(b)(1) requesting that Judge Wolle "disqualify himself from any further proceedings regarding the instant case." The recusal motion was supported by Petitioner's Affidavit.

On January 7, 1993, Judge Wolle filed an Order in which he granted the Motion to lift the stay, but in which he denied Petitioner's recusal motion. Judge Wolle wrote, in pertinent part:

> I did graduate from the University of Iowa College of Law in 1961. Since then I have made financial contributions to the Iowa Law School Foundation, a foundation that provides assistance to the University; I have three sons who have received graduate degrees from the University of Iowa; and I have presented educational programs at the University on two occasions. None of my children are now students

at the University of Iowa.

I have searched my mind and conscience. I firmly believe I can and will be fair and impartial in this case in which individuals associated with the University of Iowa are parties. I am not biased or prejudiced against the plaintiff Karen R. Lunde, or unfairly biased in favor of any of the defendants.

The duty of a federal judge to recuse is governed by 28 United States Code section 455(a) . . . The statute employs an objective reasonableness standard. [Citation omitted.] I conclude that under all circum-

> stances, both public and private, a reasonably involved person would not reasonably question my impartiality in this case. [Citation omitted.]

Having denied Petitioner's recusal motion, Judge Wolle then ordered a series of pre-trial deadlines, with trial to begin at 9:30 a.m. on Monday, July 12, 1993. Petitioner was subsequently authorized by a Judicial Magistrate to again amend her Complaint, reflecting changes that had occurred during the period of three and one-half years that Judge Wolle's stay order had been in effect.

Following several additional hearings, and after Petitioner had submitted copies of all her exhibits, and proposed jury instructions, to Judge Wolle, in

compliance with his various orders, Judge Wolle then, on July 2, 1993, ten days prior to the date the trial was to begin, entered "Rulings and Summary Judgment for Defendants." Judge Wolle wrote, in pertinent part:

> For the reasons that follow, this court concludes principles of res judicata bar plaintiff's attempt to obtain relief in this court. She is not entitled to a jury trial or a bench trial.

In his ruling, Judge Wolle characterized Petitioner's First Amendment claims as "frivolous." He further stated that "Plaintiff's First Amendment claim is barred by res judicata and also is spurious." Judge Wolle also ruled that " . . . plaintiff has cited no authorities for her theory that her Title IX

sexual discrimination claim is triable to a jury rather than to the court in a bench trial." Judge Wolle further wrote that "Plaintiff has had full and fair hearings and a complete evidentiary proceeding addressing all complaints about her dismissal from the Iowa University College of Medicine. She is entitled to no further trial on her damage claims." Judge Wolle directed the clerk of court to enter summary judgment in favor of defendants and against plaintiff, dismissing her claims and assessing costs to plaintiff.

Petitioner immediately filed a "Petition for a Writ of Mandamus Based on Denial of Seventh Amendment Jury Trial Right" with the U. S. Court of Appeals for the Eighth Circuit. The Court of Appeals, on July 16, 1993,

denied the petition for mandamus without opinion, and subsequently denied a petition for rehearing and suggestion for rehearing en banc, again without opinion.

On July 29, 1993, Petitioner filed her notice of appeal to the U. S. Court of Appeals for the Eighth Circuit. Oral argument before a panel of the Court took place on February 15, 1994. The Court of Appeals on July 6, 1994 affirmed the District Court; its opinion is set forth infra at pages A-2 through A-19. The opinion was published at 29 F.3d 367. Rehearing was denied by Order dated August 15, 1994; see page A-20, infra.

ARGUMENT

1. THE COURT OF APPEALS, IN REVIEWING THE DECISION OF THE DISTRICT COURT JUDGE WITH RESPECT TO RECUSAL, USED THE WRONG STANDARD.

There is a conflict among the Circuits as to the standard for reviewing District Court decisions on recusal. The conflict is between reviewing for abuse of discretion, and reviewing de novo. Thus, in the Fourth Circuit, the standard is unquestionably de novo. See, People Helpers Foundation v. Richmond, VA, 12 F.3d 1321, 1325 (4th Cir., 1993) ("This court reviews questions of judicial bias de novo.") On the other hand, as the instant case illustrates, the standard used in the Eighth Circuit is abuse of discretion. See, Lunde v. Helms, 29 F.3d 367, 370 (8th

Cir., 1994) ("We review rulings on motions to recuse for abuse of discretion.") See pages A-12 and A-13, infra.

In the Ninth Circuit, there appears to be disagreement among the members of the Court over the standard to be used. See, U. S. v. Chischilly, 30 F.3d 1144 (9th Cir., 1994), a case in which the majority recited use of an "abuse of discretion" standard, while in a strong dissent by Noonan, Circuit Judge, 30 F.3d at 1162, it was suggested that an objective standard should be used.

In the Tenth Circuit, the standard is abuse of discretion; see, U. S. v. Greenspan, 26 F.3d 1001, 1004 (10th Cir., 1994) ("We review the district court's denial of the motion for recusal under

an abuse of discretion standard.")

In a recent Third Circuit case, the Court of Appeals noted that "ordinarily" they review a district court's refusal to recuse pursuant to 28 U. S. Code Sec. 455 for abuse of discretion. But in that particular case, the Court of Appeals said, in a footnote, that

> . . . we . . . hold that because Judge L***'s impartiality could reasonably be questioned, his refusal to disqualify himself was an **improper exercise** of his discretion. [Emphasis supplied.]

See, Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3rd Cir., 1993); this case was brought to the attention of the panel during oral argument.

In some of the Circuits, the Courts appear to be attempting to apply recent

U. S. Supreme Court decisions to the facts of the cases before them. Thus, they are using a de novo review standard, without acknowledging that they have abandoned the older abuse of discretion standard of review. See, e.g., Aronson v. Brown, 14 F.3d 1578 (Fed. Cir. 1994); Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138, 1141 (2nd Cir. 1994); Matter of Huntington Commons Associates, 21 F.3d 157 (7th Cir. 1994). In the latter case, the Court of Appeals for the Seventh Circuit, in a case decided April 5, 1994, said its decision was governed by the U. S. Supreme Court's decision in Liteky v. U. S., ____U.S.____, 114 S.Ct. 1147, 127 L.Ed.2d 474, decided March 7, 1994. The Liteky decision further amplified some of the principles set forth in Liljeberg v.

Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). The Liljeberg decision was the centerpiece of Petitioner's oral argument before the panel in the instant case; the Liteky decision was not available at the time of the oral argument, but was brought to the attention of the Court of Appeals in the Petition for Rehearing.

Petitioner believes that the U. S. Supreme Court, in its Liljeberg and Liteky decisions, has adopted a de novo standard of review. However, in not specifically endorsing de novo review, the Supreme Court has left it open for the Courts of Appeal in the various circuits to proceed without direction and to continue to use the obsolete "abuse of discretion" standard; thus,

Petitioner's argument to the Court of Appeals for the Eighth Circuit, that a de novo standard of review should be used, fell on deaf ears.

The Court of Appeals, here, held "that the district court did not abuse its discretion in denying the motion to recuse." Lunde v. Helms, supra, 29 F.3d 367 at 370; page A-13, infra.

The Court of Appeals went on to say that:

> We do not think that the district judge's having graduated from the university law school, even though the university is a party defendant, **without more**, is a reasonable basis for questioning the judge's impartiality. [Emphasis supplied.]

But Petitioner never suggested that the mere fact that Judge Wolle graduated from the University of Iowa, one of the Respondents here, was enough to disqualify him; Petitioner was well aware of the precedents cited by the Court of Appeals, and accordingly did not seek to disqualify Judge Wolle early on, even though his bias in favor of the University of Iowa was obvious to the Petitioner from the very beginning.

The Court of Appeals, intent on justifying what they saw as the proper exercise by Judge Wolle of his discretion, then proceeded to ignore the very obvious similarity between the facts of the instant case, and the facts of the Liljeberg case, which had been explained to the panel during oral argument in as much detail

as time permitted. So eager was the Court to justify Judge Wolle that they read into the record facts which were not there. For example, the Court's opinion characterized the financial constributions Judge Wolle disclosed that he had made to the University of Iowa Law Foundation as "alumni contributions" and treated them as de minimus. But 28 U. S. Code Sec. 455 (b)(4) does not contain a de minimus exception for the term "financial interest" and (d)(4) defines "financial" interest to include a "relationship" as director, adviser, or "other active participant in the affairs of a party" which was well within the participation disclosed by Judge Wolle. The statute, in (d)(4) (i), (ii), (iii), and (iv) spelled out the exceptions;

Judge Wolle's participatioin did not fall within any of the exceptions.

In Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), the decision affirmed by the Supreme Court in 1988, the Court of Appeals for the Fifth Circuit said, in pertinent part:

> In the present case there can be no serious doubt that Judge C****, as a member of the Loyola [University] Board of Trustees, had an interest in the well-being of Loyola University. Nor can it be doubted that that interest would be substantially affected by the outcome of the lawsuit [before the court] . . .

See, 796 F.2d 796, at 800.

In the instant case, the Court of Appeals for the Eighth Circuit said:

> . . . we do not think the district judge has any financial interest in these proceedings. We do not think that making alumni contributions or participationg in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality. [Citation omitted.] Even a substantial judgment against the university would have no financial impact on the district judge as a graduate of the university law school. . . .

See, Lunde v. Helms, supra, 29 F.3d at

371, pages A-14 and A-15, infra.

Ultimately, the continued use of the "abuse of discretion" standard of review leads to decisions on recusal, such as this one, which cannot be reconciled with 28 U. S. Code Sec. 455 as currently written, nor with the applicable decisions of the U. S. Supreme Court. In accordance with Supreme Court Rule 10.1, it is respectfully urged that the considerations set forth in subparagraphs (a) and (c) thereof provide ample justification for review of the instant case on writ of certiorari.

2. THE COURT OF APPEALS TOTALLY IGNORED PETITIONER'S SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL IN SUSTAINING THE DISTRICT COURT'S SUMMARY JUDGMENT GROUNDED ON RES JUDICATA.

Petitioner amended her Complaint to allege damages, a common law remedy, and to add a request for a jury, on August 15, 1989. The ONLY reason that her Federal claims, in District Court, did not go forward to judgment at that time, was that the stay order by Judge Wolle, entered August 31, 1989, held up her Federal lawsuit for three and one-half years, while allowing the State administrative procedures pursuant to Chapter 17A, Code of Iowa, to continue. In fact, Judge Wolle's stay order improperly conditioned Petitioner's return to Federal Court upon the completion of the State administrative

case. If, and to the extent, that Judge Wolle violated Petitioner's constitutional rights to a jury trial on damages, he also violated the command of Rule 38(a), Federal Rules of Civil Procedure:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The amount in controversy set forth in Petitioner's Complaint (Amended) was and is twenty million dollars (five million dollars actual damages, fifteen million dollars punitive damages).

Petitioner's right to proceed against all Respondents, in damages, for sex discrimination in education, 20 U. S. Code Sec. 1681 et seq, is established

by the U. S. Supreme Court's decision in Franklin v. Gwinnett County Public Schools, ____U.S.____, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). The Eleventh Amendment immunity of certain of the Respondents that would otherwise exist was abrogated by Congress in the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S. Code Sec. 2000d-7.

Petitioner also has the right to a jury trial on her claims pursuant to 42 U. S. Code Section 1983, which have not been submitted to any State court or administrative agency, at any time.

[Petitioner seeks no damages relief from certain of the Respondents who are immune from such relief under Sec. 1983, but she seeks declaratory relief, which is prospective only, from all Respondents; see, Hafer v. Melo, 502 U.S.____,

112 S.Ct. 358, 116 L.Ed.2d 301 (1991).]

Petitioner voluntarily dismissed her claims for injunctive relief; all remaining claims are legal, and Petitioner's current Complaint demands a jury trial with regard to all legal claims.

The Court of Appeals also ignored the fact that Petitioner reserved her right to return to Federal court, and gave notice as required that she was not submitting her Federal claims to the State administrative proceedings, on several occasions. This was done pursuant to the U. S. Supreme Court's decision in England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

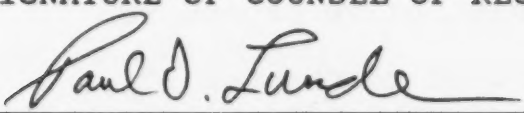
The Court of Appeals also ignored the many U. S. Supreme Court decisions

that Petitioner cited in support of her Seventh Amendment, U. S. Constitution, right to a jury trial in Federal court. See, Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).

Finally, the Court of Appeals erred in affirming the decision of Judge Wolle granting summary judgment based on res judicata because all of the State administrative procedures took place pursuant to Chapter 17A, Code of Iowa, the Iowa Administative Procedure Act, and Sec. 17A.23 ex-

plicitly provides that "the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now in existence or hereafter enacted. . . ." Thus, it was error to hold that a decision pursuant to Ch. 17A would be considered preclusive with respect to a suit under 20 U.S. Code Sec. 1681 or 42 U.S. Code Sec. 1983.

SIGNATURE OF COUNSEL OF RECORD:



Paul D. Lunde, Attorney for Petitioner, a member of the Bar of this Court.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2957

Karen R. Lunde, Appellant,	*	
v.	*	Appeal from the
Charles M. Helms, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa; John W. Eckstein, Dean of the College of Medicine, University of Iowa; College of Medicine, University of Iowa; Hunter R. Rawlings, III, President, University of Iowa; Jerald W. Dallam, Registrar, University of Iowa; University of Iowa, State of Iowa, Appellees.	*	United States District Court for the Southern District of Iowa

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Submitted: February 15, 1994

Filed: July 6, 1994

Before McMILLIAN, WOLLMAN and MAGILL,

Circuit Judges

McMILLIAN, Circuit Judge.

Karen R. Lunde appeals from a final order entered in the District Court[1] for the Southern District of Iowa granting summary judgment in favor of defendants, the University of Iowa and several individual university officials, because res judicata barred litigation of her amended complaint. Lunde v. Helms, No. 4-89-CV-80128 (S.D. Iowa July 2, 1993). For reversal Lunde argues the district court erred in (1) denying the motion to recuse and (2) granting summary judgment in favor of defendants. For the reasons discussed below, we affirm the order of

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[1]The Honorable Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

the district court.

The following is an abbreviated statement of the facts. The facts have been set forth in some detail in the state appellate court opinion. Lunde v. Iowa Board of Regents, 487 N.W.2d 357 (Iowa Ct. App.), cert. denied, 113 S.Ct. 377 (1992); see also Lunde v. Helms, 898 F.2d 1343 (8th Cir.) (per curiam) (appeal of stay of district court proceedings), cert. denied, 498 U.S. 897 (1990).

In 1987 Lunde received unsatisfactory reviews in three clinical rotations during her third year of medical school at the University of Iowa. The medical school placed her on academic probation. Lunde continued to have problems in clinical rotations and was granted a leave of absence. Lunde re-enrolled in

June 1988 but continued to have clinical performance problems. On February 16, 1989, following an evaluation of her clinical performance, the medical school's committee on student promotions recommended cancellation of her registration in the medical school (in effect, dismissing her). The dismissal was reviewed and affirmed by the executive committee of the medical council and by the university's vice-president of academic affairs.

Earlier, on February 1, 1989, Lunde had filed a civil rights action in federal district court, alleging that she was about to be wrongfully dismissed from medical school. She sought declaratory relief, a temporary restraining order and a preliminary injunction. She later dismissed the initial complaint

and, on February 15, 1989, filed an amended complaint alleging her dismissal was the result of sex discrimination. On Febuary 16, 1989, the district court held a hearing and denied her request for a temporary restraining order and a preliminary injunction. (That was also the day the medical school dismissed her.) On March 22, 1989, the district court heard addditional arguments. Lunde filed new motions for preliminary injunctive relief; defendants filed motions to dismiss. Lunde amended her complaint to allege her dismissal was punishment for exercising her first amendment rights and a denial of due process. In August 1989 the district court held additional hearings.

On August 31, 1989, the district court stayed further proceedings pending

the outcome of administrative and state judicial proceedings concerning Lunde's challenge to her dismissal from medical school. The district court further noted that it would vacate the stay and hold further proceedings if Lunde demonstrated that if any administrative and state judicial proceedings plainly infringed her constitutional rights or federal statutory rights and that the state courts refused to address or remedy them. Lunde appealed the stay order, and this court affirmed the stay as a matter of docket management. Lunde v. Helms, 898 F.2d at 1345.

In September 1989 the university board of regents denied Lunde's appeal of her dismissal. In October 1989 Lunde filed a petition for judicial review of the university's decision in state dis-

trict court. Lunde expressly asserted that she was reserving her federal claims for litigation in federal district court; nevertheless, she vigorously litigated all of her federal claims in the state courts. Specifically, Lunde claimed that she was entitled to "contested case" procedures[2] and that defendants had discriminated against her on the basis of sex and had denied her freedom of speech, due process and equal protection. The state district court ruled that the dismissal was not a contested case under state law

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[2]Under state law a "contested case" requires a formal, adversarial, evidentiary hearing before the state agency. By contrast, "other agency action" requires no more than an informal hearing. See Lunde v. Iowa Bd. of Regents, 487 N.W.2d 357, 359-360 (Iowa Ct. App.), cert. denied, 113 S.Ct. 377 (1992). In the present case the university and the medical school did not follow the contested case procedures and instead followed the informal procedures set forth in the medical school student handbook.

and, following a full adversarial trial, including the opportunity to present new evidence and to cross-examine witnesses, found that Lunde had been dismissed solely for academic reasons, not because of sex discrimination or in retaliation for expressing political views or opinions critical of medical school professors, and had not been denied due process or equal protection. The state appellate court affirmed, the state supreme court declined review, and the Supreme Court denied Lunde's petition for writ of certiorari.

Lunde then returned to federal district court and moved to dissolve the stay. She also moved to recuse the district judge on the ground of bias and prejudice. The district court vacated the stay, denied the motion to recuse

and granted Lunde leave to file an amended complaint, adding a Title IX damages claim and a demand for a jury trial. Defendants filed an answer and a motion for summary judgment. Following a hearing conducted by telephone conference call, the district court granted summary judgment in favor of defendants on the ground of res judicata. The district court specifically noted that Lunde had already litigated in state court her claims that she had been dismissed from medical school because of sex discrimination, in retaliation for expressing her political views or opinions critical of medical school professors or in violation of due process and equal protection. Slip op. at 7-13. This appeal followed. We affirm.

MOTION TO RECUSE

Lunde first argues the district court erred in denying the motion to recuse. Lunde argues the district judge was biased and prejudiced against her, in part because of his association with the University of Iowa, a party defendant. The district judge is a graduate of the University of Iowa College of Law. Lunde also argues the district judge has a "financial interest" in the University of Iowa because he had made financial contributions to the Iowa Law School Foundation and had presented two educational programs at the University of Iowa. Lunde further argues the district judge had a financial interest because her lawsuit, if successful, would result in a multi-million dollar judgment against the University of Iowa.

As a preliminary matter, we note

that the district court could have denied the motion to recuse as untimely filed. The original complaint was filed in February 1989; the first amended complaint was filed in August 1989. The motion to recuse was not filed until December 1992. Allowing for the time the federal proceedings had been stayed, some seven or eight months had elapsed between the filing of the complaint and the motion to recuse. See, e.g., Willner v. University of Kansas, 848 F.2d 1023, 1028 (10th Cir. 1988) (motion to recuse filed some 10 months after complaint was untimely) (citing cases), cert. denied, 488 U.S. 1031 (1989). However, the district court did not rely on this ground and denied the motion to recuse on the merits.

We review rulings on motions to

recuse for abuse of discretion. See, e.g., Gray v. University of Arkansas, 883 F.2d 1394, 1398 (8th Cir. 1989) (judge's partnership five years earlier with member of Board of Trustees, a party defendant, was not grounds for recusal). The test is one of objective reasonableness, that is, whether the judicial officer's impartiality might reasonably be questioned under the circumstances. See 28 U.S.C. Sec. 455(a).

We hold the district court did not abuse its discretion in denying the motion to recuse. We do not think that the district judge's having graduated from the university law school, even though the university is a party defendant, without more, is a reasonable basis for questioning the judge's impar-

tiality. See Easley v. University of Michigan Board of Regents, 906 F.2d 1143, 1146-47 (6th Cir. 1990) (judge's graduation from and affiliation with law school, which was party defendant, not grounds for recusal, absent evidence that judge was privy to extrajudicial information relating to student's situation at law school), cert. denied, 499 U.S. 947 (1991); Brody v. President of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (per curiam) (judge's having attended or graduated from university which was party to case, without more, not grounds for recusal), cert. denied, 455 U.S. 1027 (1982).

In addition, we do not think the district judge has any financial interest in these proceedings. We do not think that making alumni contribu-

tions or participating in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality. See Willner v. University of Kansas, 848 F.2d at 1028 (participation in alumni activities). Even a substantial judgment against the university would have no financial impact on the district judge as a graduate of the university law school.

RES JUDICATA

Lunde next argues the district court erred in granting summary judgment in favor of defendants on the ground of res judicata. The district court held that Lunde's federal constitutional and statutory claims had already been fully and fairly litiga-

ted in the state courts and that therefore res judicata barred litigation of her federal action.

Lunde first argues the district court improperly stayed her federal action. These arguments were resolved against her on the merits in the first appeal and will not be reconsidered in this appeal. See Lunde v. Helms, 898 F.2d at 1345 (interlocutory appeal of stay treated as petition for mandamus; holding district court did not abuse its discretion in staying federal case pending resolution of ongoing state proceedings as matter of docket management).

Lunde also argues the district court erred in holding that the state court judgment barred any subsequent federal litigation. She argues that

applying the doctrine of res judicata merely compounded the error involving the improper stay. We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Insurance Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992). We agree with the district court

that litigation of Lunde's federal action was barred by the prior state court judgment and therefore defendants were entitled to judgment as a matter of law.

"Res judicata bars relitigation of a claim if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." Lane v. Peterson, 899 F.2d 737, 741 (8th Cir.), cert. denied, 498 U.S. 823 (1990); see also Israel v. Farmers Mutual Insurance Ass'n, 339 N.W. 2d 143, 146-47 (Iowa 1983) (similar analysis); cf. University of Tennessee v. Elliott, 478 U.S. 788, 798-99 (1986) (preclusive effect given to decision of state agency acting in judicial capa-

city). All three requirements were met in the present case. Lunde fully and vigorously litigated her sex discrimination, first amendment, due process, and equal protection claims in state court. The state court judgment was a final judgment on the merits rendered by a court of competent jurisdiction. The parties were essentially the same in both cases. The state and federal lawsuits involved the same cause of action, that is, the same nucleus of operative facts. Lane v. Peterson, 899 F.2d at 742, citing Restatement (Second) of Judgments Sec. 24 (1980).

Accordingly, we affirm the order of the district court.

A true copy. Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2957SIDM

Karen R. Lunde,	*	
	*	Order Deny-
Appellant,	*	ing Petition
	*	for Rehear-
v.	*	ing and
	*	Suggestion
Charles M. Helms, etc.,	*	for Rehear-
	*	ing En Banc
et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 15, 1994

Order Entered at the Direction of the Court.

/s/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit